IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 996

NORTHERN MINING CORPORATION (a corporation),
Petitioner,

—against—

MAX TRUNZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

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OCTOBER TERM, 1941.

No. .

NORTHERN MINING CORPORATION (a corporation),
Petitioner,

—against—

MAX TRUNZ,
Respondent.

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Northern Mining Corporation for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, respectfully shows:

The petitioner seeks to review the decision of the Circuit Court of Appeals for the Ninth Circuit (124 Fed. 2d 14), affirming a judgment of the United States District Court for the State of Montana, granting the relief demanded in the complaint (R. 380).

The transcript of record in this case, including the proceedings in the Circuit Court of Appeals has been filed herewith in accordance with Rule 38 of this Court.

Jurisdiction.

The basis of jurisdiction of this Court is that the Circuit Court of Appeals has decided an important question

of local law (Revised Codes of Montana of 1935, §§5933 and 6004) in a way conflicting with the applicable local decisions.

This action to quiet title was commenced in the State District Court. Jurisdiction of the United States District Court was invoked by virtue of sub-division 1 of Section 41, Title 28, U. S. C., by reason of diversity of citizenship and the matter in controversy, exclusive of interest and costs, exceeding the sum of Three Thousand Dollars, as appears by the Petition for Removal (R. 7), filed as provided by Section 71 of Title 28, U. S. C., and the Order of the State District Court removing the action to the United States District Court for the District of Montana (R. 17).

Statement of Facts.

The action was commenced by respondent to quiet title to real property in Park County, Montana, respondent alleging in his complaint that he owned the real property in fee simple and that the defendants claimed some title thereto (R. 3). The complaint was amended by respondent to bring in other defendants (R. 6). The action was removed to the United States District Court on petition of the Northern Mining Corporation, petitioner (R. 17). The petitioner answered and denied that the respondent owned the property in fee simple and alleged that it owned the property itself in fee simple (R. 20). For its first defense, the petitioner alleged that on the 2nd day of July, 1934, the Glengarry Mining Company, one of the defendants, owned the property in fee simple absolute, that on that day it purported to convey to the respondent the said lands, but that the conveyance was void and of no force and effect, in that, the laws of the State of Montana had not been complied with with refer-

ence to a conveyance of real property by a corporation, in that, no meeting of the stockholders of that corporation was ever held or called for the purpose of considering the sale of the real property, as required by the State law. For its second defense, the petitioner alleged that the deed was void as a mortgage for the same reasons. For its third defense, the petitioner alleged that about the 20th day of June, 1936, a judgment was rendered by the State District Court in favor of one Seth R. Crone and against Glengarry Mining Company, the owner of the property on that date, that on the 28th of July, 1936, a writ of execution was issued, directed to the Sheriff of Park County, and levy was made upon the real property in question, and the property sold under the judgment for the sum of $14,308.85, and that thereafter, one Birkel, then a stockholder of the Glengarry Mining Company, as such stockholder and for the benefit of himself as such stockholder, and all other stockholders who desired to join, redeemed the property, as provided by the State laws, paying therefor the sum of $16,291.17; that thereafter, a Sheriff's deed was issued to him, and he thereafter conveyed the property to the petitioner. For a defense to the respondent's complaint the petitioner alleged that on the 2nd day of July, 1934, the Glengarry Mining Company borrowed from the respondent the sum of $25,000 and as a condition of lending the money, the respondent exacted a usurious rate of interest. The respondent filed its reply to the petitioner's answer (R. 34), in which he denied the substantial allegations of the first two affirmative defenses. Either positively, or because of lack of knowledge, he admitted as to the third affirmative defense designated as paragraph IV in the answer, the suit in the State Court, sale of the property involved under execution, the redemption by Birkel, and transfer by him to the petitioner of the

property in question, and denied the other allegations of the complaint; the respondent denied the allegations of the answer with reference to usury, and as a further reply to the affirmative portions of the answer of the petitioner, and in the nature of deraignment of title, alleged that one Branser on the 6th of August, 1932, until the 2nd of July, 1934, was the owner of the premises, and that on August 6, 1932, he agreed, in writing, to sell the premises to the Glengarry Mining Company for the sum of $33,500, and that in November, 1933, after paying certain moneys on account, Glengarry Mining Company was in default and Branser commenced an action against it in the State Court for cancellation of the contract and recovery of possession of the real property and for damages; that thereafter, an agreement in compromise and settlement was entered into between Branser and the Glengarry Mining Company, whereby it was stipulated that unless the Glengarry Company paid to Branser on or before the 1st of July, 1934, the sum of $25,000, Branser was entitled to take judgment against the Glengarry Company in the action, and, if the payment was made, Branser would deliver a deed; that on the 28th day of June, 1934, this sum was unpaid; that the Glengarry Company did not have sufficient funds with which to make further payment, and it agreed, in writing, with the respondent, that if respondent paid the sum of $25,000, it would deliver a deed of the premises to the respondent which is set out in writing as an exhibit, appearing at page 50 of the record (Exhibit A).

This agreement was not validly entered into by the corporation. It was simply signed by one Guenzel as president and one Keck as treasurer and no acknowledgment was attached thereto showing authority of the board of directors. There is no evidence of any authority of these officers to execute the agreement. This is in violation

of Sections 5933 and 6004 of the Revised Codes of Montana of 1935.

Respondent further alleged that the 1st of July being a Sunday, on the 2nd of July he paid the $25,000, and on that day, the Glengarry Mining Company executed a deed to the respondent, and that Glengarry Mining Company never after the 28th of June raised the money or did the things that respondent claimed it should have done under the agreement, Exhibit A (R. 50) and that by reason thereof, the petitioner is estopped from asserting that the respondent is not the owner of the lands or that the Glengarry Company and its officers did not have the authority to make the transfer.

This deed was not validly executed. Said Sections 5933 and 6004 were not complied with.

The respondent in a letter of June 10, 1935, to Birkel admitted that the $25,000 advanced to the Glengarry Mining Company was a loan. This letter in part reads:

> "Confirming conversation with the Committee which you accompanies on Saturday, June 8th, to my office, wherein I was requested to give my promise in writing to extend the loan that I made to the Glengarry Mining Company in the event that they were not able to meet the payment due on the due date this year and I assured the Committee that I would extend the loan for another year.
>
> * * *
>
> May I also take this opportunity of advising you that there are no selfish motives involved in loaning this money to the Glengarry Mining Company to go ahead with their job. I know that Mr. Crone feels the same way. There does not have to be any fear on any side that there is any underhanded work going

on. Mr. Crone and myself are about in the same frame of mine and that is if we win, we all win and if we lose, we all lose" (R. 254-255).

The Question Presented.

Did the Circuit Court of Appeals in applying Sections 5933 and 6004 of the Revised Codes of Montana, 1935, fail to follow said statutes as construed by the Supreme Court of Montana in deciding that the agreement of June 28, 1934 (Ex. "A", R. 50) and the alleged deed dated July 2, 1934 (Plaintiff-Respondent's Ex. 7, R. 107) were valid instruments properly executed by the Glengarry Mining Company?

WHEREFORE, the petitioner prays that this court issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit directing it to send to this court for review a full transcript of the record in said Circuit Court of Appeals in the case entitled *Northern Mining Corporation* (a corporation), Appellant, v. *Max Trunz,* Appellee, and that the decree of said Circuit Court be reversed, and for such other relief in the premises as may be just.

NORTHERN MINING COMPANY,
By LEON R. JACOBS,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

NORTHERN MINING CORPORATION (a corporation),

Petitioner,

—against—

MAX TRUNZ,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions of Courts Below.

There was no opinion by the District Court after a year's deliberation.

The opinion by the Circuit Court of Appeals is printed at pages 358-380 of the Record and is reported in 124 Fed. (2d) 14.

II.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended February 13, 1925.

The date of the decision sought to be reviewed is December 10, 1941.

III.

Statement of Case.

The principal facts have been set forth in the petition. The pertinent additional facts will be set forth in the points following.

IV.

Specification of Errors.

I. The Circuit Court of Appeals erred in holding that the written instrument dated June 28, 1934, between Glengarry Mining Company and Max Trunz (Ex. A, R. 50) purporting to be executed by Glengarry Mining Company, a corporation, was a valid agreement of said company.

II. The Circuit Court of Appeals erred in holding that the instrument dated July 2, 1934 (Plaintiff-Respondent's Ex. 7, R. 107) was a valid deed from Glengarry Mining Company to Max Trunz.

V.

The Applicable State Statutes.

The Revised Codes of Montana (1935) so far as material here provide in Sections 5933 and 6004 as follows:

> "5933. Corporate Powers and Business Exercised by Board of Directors—Number and Membership of Board quorum. The corporate powers, business, and property of all corporations formed under this title must be exercised, conducted and controlled by a

board of not less than three nor more than thirteen directors, to be elected from among the holders of stock, * * *."

"6004. PROCEDURE FOR SALE, LEASE, ETC., OF CORPORATE PROPERTY.

* * *

Thereupon any proposition for the sale, lease, mortgaging, exchange, or other disposition of the whole or any part of the property and assets of every kind and description of such corporation, for property, or for the whole or part of the capital stock of any other corporation, whether domestic or foreign, or otherwise, may be considered and acted upon by said meeting, and if stockholders representing at least two-thirds (⅔) of the whole number of shares of the capital stock of said corporation then outstanding, and of record on the books of the corporation, and entitled, as aforesaid, to vote at such meeting, appearing at said meeting in person or by agents or proxies, as above provided, vote in favor of any such proposition, whether proposed by the directors or trustees, or not, as said stockholders may see fit, which proposition shall be in the form of a resolution specifying the particulars thereof and entered on the minutes of said stockholders' meeting, the said proposition or resolution shall be taken and adopted as the act of the corporation, and shall be carried out as such, and shall be approved and adopted by the board of directors or trustees; * * * upon the adoption and approval by the board of directors or trustees of the corporation of such proposition or resolution, the corporation and its officers shall have full power and authority to do all acts and to execute all conveyances or other instruments in writing which are necessary or proper

to carry out the said proposition or resolution, and the sale, lease, mortgage, exchange, or other conveyance of the whole or any part of the property of said corporation, authorized by said proposition or resolution, shall thereupon take effect and have the same force as if all the stockholders of the corporation had consented thereto; provided, that nothing contained in this act shall be deemed to limit or restrict the powers of the board of directors or trustees of such corporation in relation to the disposition of property or the conduct of business * * *."

Argument.

POINT I.

The alleged agreement dated June 28, 1934 (Ex. A, R. 50) was not a valid instrument binding the corporation Glengarry Mining Company.

The alleged agreement was executed in the following form:

"GLENGARRY MINING COMPANY
By (Sgnd) MARTIN R. GUENZEL
Pres
(Sgnd) CARL H. KECK
Treasurer
(Sgnd) MAX TRUNZ" (R. 12).

It will be noted that the foregoing paper is not acknowledged nor is the corporation seal affixed and the witness clause contains no recital that the officers were authorized by the directors to execute the instrument on behalf of the corporation.

There is no evidence that the board of directors at a board meeting authorized the president and treasurer of the corporation to execute the foregoing instrument.

Section 5933 of the Revised Codes of Montana, hereinabove set forth, provides that the corporate powers, business and property of all corporations formed under the Act must be exercised, conducted and controlled by the board of directors of such corporations.

The Supreme Court of Montana, in *Pioneer Minerals Corporation, et al.* v. *Larabie Bros. Bankers, Inc., et al.*, 99 Mont. 358; 49 Pac. (2d) 884 at 886 said:

> "The Board of Directors, acting in the manner prescribed by law, and not the stockholders of a corporation, conducts and controls the business and property of the corporation."

It is apparent from the record that this so-called agreement was *never authorized by the stockholders or the directors of the corporation,* but was the plan and device of the president, also a director, and Keck, a director.

The directors of a corporation bind it only when acting as a board or body.

Sections 5933-5938, R. C. M. 1935.

The acts or statements of individual directors outside of a meeting are of no effect and do not bind the corporation; a director has no such power merely by virtue of his office as such.

Raish v. *Orchard Canal Co.*, 67 Mont. 140; 218 Pac. 655.

No presumption attaches of authority, merely by the signing, where the seal of the corporation is omitted.

> *Genzberger* v. *Adams*, 62 Mont. 430; 205 Pac. 658, at 660.

The Circuit Court of Appeals in its opinion stated, on the question of whether or not the advancing of the $25,000 by the respondent was a loan:

> "On this point the evidence is in conflict * * *" (R. 363).

This statement is wholly unwarranted. There is not one word or scintilla of evidence in the entire record even attempting to explain, contradict or deny this letter of the respondent dated June 10, 1935 (R. 254), which was written **after** the execution of the alleged deed. In other words the Circuit Court of Appeals tells the respondent he didn't make a loan, he bought the property! What a travesty on justice! More than that respondent's letter of June 10, 1935, written when he already had the deed, shows that he recognized, as the lower courts failed to do, that the transaction was still a loan.

POINT II.

Plaintiff-respondent's Exhibit 7 (R. 107), the alleged deed purporting to be executed July 2, 1934, by Glengarry Mining Company is invalid as a conveyance of the corporation's property.

While the instrument appears to be signed by the corporation by the president and assistant secretary and is sealed and has a corporation acknowledgment attached, there is no evidence that the execution of this instrument

was authorized by either the directors or stockholders of the corporation.

The authorities and argument in Point I are applicable to the execution of this instrument and they show that this is not a valid conveyance.

This was an attempt to dispose of one of two of the developed mining properties of the Glengarry Mining Company (R. 180) in violation of the express provisions of Section 6004 of the Revised Codes of Montana.

Section 6004 above quoted, provides in clear and explicit language that

> "* * * any proposition for the sale, lease, mortgaging, exchange, or other disposition of the whole or any part of the property and assets of every kind and description of such corporation * * * may be considered and acted upon by said meeting, and if stockholders representing at least two-thirds (⅔) of the whole number of shares of the capital stock of said corporation then outstanding, and of record on the books of the corporation, and entitled, as aforesaid, to vote at such meeting, appearing at said meeting in person or by agents or proxies, as above provided, vote in favor of any such proposition * * *."

The statute then provides the manner by which the determination of the stockholders shall be carried into effect. The Circuit Court of Appeals in construing this section relied upon the provision which reads as follows, which it has italicized in the footnote (124 Fed. (2d) at p. 19):

> "* * * provided, that nothing contained in this act shall be deemed to limit or restrict the powers of the board of directors or trustees of such corporation in

relation to the disposition of property or the conduct of business."

The foregoing provision manifestly has no application to the attempted conveyance of the mining properties described in Exhibit 7, because *there is no evidence in the case to show that the consent or approval of the board of directors* of the Glengarry Mining Company *had ever been given* to the president and asst. secretary to execute such an instrument.

The Supreme Court of Montana had occasion to apply the statute (Sec. 6004) in *Hanrahan* v. *Andersen et al.*, 108 Mont. 218. The Supreme Court rendered a lengthy opinion, setting out the purposes of the statute, and the law as it existed before its enactment. In that case conveyances were made without compliance with the statute, and an action was brought to have them set aside. In deciding the question the Supreme Court said, page 231:

"It has been held that the directors, unless specially empowered, could not sell any portion of the estate of the corporation essentially necessary for the transaction of its customary business. (2 Thompson on Corporations, secs. 1289, 1290; *Rollins* v. *Clay*, 33 Me. 132.) The reason for the rule is that the purpose of a solvent corporation and of its stockholders is not to be defeated in whole or in part by the directors, nor even by the stockholders without unanimous consent, unless expressly provided by law. (*Forrester* v. *Boston & Mont. Com. C. & S. Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.) It was to relax the rule in the latter respect so as to prevent a small minority from thwarting the will of the overwhelming majority that the statute now appearing as section 6004, *supra*, was enacted; and to make the relaxation of the law effective, its requirements

must be essentially complied with. (*Wortman* v. *Luna Park Amusement Co.*, 61 Mont. 89, 201 Pac. 570.)

Defendants contend that these transfers to Consolidated and to Andersen do not come within the provisions of section 6004, because Capital retained its official books, records and office, and thereafter transacted business and was shown thereafter to have had other property. The argument overlooks the reason for the rule. If the question were merely whether the corporation had other property after the transaction, no sale could ever be objected to by a minority stockholder, for in any sale other property is received as consideration. Furthermore, the statute refers to the sale of 'the whole or any part' of the property. Every part of the statute must be construed as having some meaning, and since the obvious purpose of the statute was to enlarge corporate powers to sell property, it must be construed as authorizing sales not already within the powers of the board of directors because not in the furtherance and in the ordinary course of the corporation's estalished business. * * *

The conveyance to Consolidated was a nullity, for the stockholders' meetings purporting to authorize were held on insufficient notice. Whether the other defects indicated in those proceedings were material need not be considered."

and at page 233:

"Furthermore, the trust deed to Andersen was obviously void because of failure to comply with the provisions of section 6004."

The Supreme Court declared that transfers without compliance were nullities, that they were "obviously void".

No stronger language could be used, and this decision clearly shows that the alleged deed did not convey any title.

The Circuit Court of Appeals attempted to distinguish the *Hanrahan* case, stating:

> "It is also apparent from the record in that case that the transactions involved virtually all of the corporate assets and greatly affected the established corporate business, and therefore came well within that class of transactions necessitating compliance with the statute."

This does not distinguish the case but on the contrary clearly shows its application to the instant case. The attempt by the officers of the Glengarry Company to convey the property of the company to this respondent was not the sale of personalty or even of a small piece of real property, but a transfer of a large part of the corporation's assets.

CONCLUSION.

It is respectfully submitted that the case merits review by this Honorable Court and that a writ of certiorari should be issued, as prayed for.

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IN THE

Supreme Court of the United States

October Term, 1941.

No. 996.

NORTHERN MINING CORPORATION
(a corporation),

Petitioner,

AGAINST

MAX TRUNZ,

Respondent.

Respondent's Brief in Opposition to Petition For a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

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CASES AND AUTHORITIES CITED.

IN THE

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OCTOBER TERM, 1941.

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NORTHERN MINING CORPORATION
(a corporation),
Petitioner,

AGAINST

MAX TRUNZ,
Respondent.

Respondent's Brief in Opposition to Petition For a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

I.

Opinions Delivered in the Courts Below.

The unanimous opinion of the Circuit Court of Appeals for the Ninth Circuit may be found at pages 358-380 of the Transcript of Record and is reported in 124 Fed. (2d) 14. The District Court rendered no opinion.

II.

Statement of the Case.

Important facts disclosed by the Transcript of Record but not sufficiently stated in the petition and in the brief of the petitioner.

The Judge who tried this case in the District Court found that the officers of the Glengarry Mining Company (hereinafter for brevity referred to as "the mining company") in executing the instruments mentioned in petitioner's "Specification of Errors" acted in connection with obligations and contracts essential to the ordinary affairs of said company and for the purposes of said company (Findings of Fact 11, 15, 19 and 20; R. 295-308). The gravamen of the petition is the claimed failure of the mining company and its stockholders to pursue the provisions of Section 6004, Revised Codes Montana 1921 and 1935 (R. 371-373). The transactions out of which arose the dealings between respondent, Trunz, and the officers of the mining company purporting to act on its behalf should receive careful consideration.

The facts with respect to these transactions are very definitely disclosed by the Transcript of Record but are not sufficiently and clearly stated in the petition and petitioner's brief to fairly present to this court the real questions involved.

The property, title to which has been quieted in respondent (hereinafter for brevity referred to as the Branser property) is described as the Lula and Contract Lode Mining Claims and the Lula Extension Lode Mining Claims situate in Park County, Montana, and was owned by Peter H. Branser in fee simple from August 26, 1921, until July 2, 1934 (R. 198, 287-288).

It is certain that this Branser property never did belong to the mining company; the mining company never

had anything other than what amounted to a lease upon this property and an option to buy it; it is also certain that so far as Peter H. Branser, the owner of the property, was concerned, the mining company from a practical standpoint had forfeited this option as of July 2, 1934, the date upon which respondent paid the money to Branser, the payment of which resulted in the release from escrow of the deed from Branser to the mining company (Plaintiff's Exhibit 6, R. 102-105; Findings of Fact 12 and 13, R. 298-301) and the execution of the deed (Plaintiff's Exhibit 7, R. 107-110; Findings of Fact 15, R. 302-304) from the mining company to respondent. It is further certain that the real result of respondent's dealings with the mining company was to give it a new and further option to buy the Branser property from him. Hence, in legal contemplation, the mining company never owned and never sold the Branser property to respondent (See Section 6785, Revised Codes Montana 1921 and 1935; Conclusion of Law 2, R. 331; Opinion, R. 367-368).

The Record shows that commencing with August 6, 1932, the mining company entered into possession of the Branser property under an option to buy it and thereafter continued in possession of the same until July 2, 1934, a period of approximately twenty-three months. The possession taken by the mining company was pursuant to an agreement by the terms of which time was declared to be the essence and by which agreement the mining company was given the option by Branser of purchasing the Branser property for the sum of $33,500 at any time on or before October 1, 1933, such purchase price being payable in stated installments. Including the initial payment of $3,000 made when the option was given, the mining company paid only $4,000 within the time limit of the option, and because of its failure to purchase, Branser reclaimed the deed deposited in escrow in connection with the option. During all this time the mining

company had been in possession of the Branser property and had been operating the same. Notwithstanding the failure of the mining company to pay, it refused to surrender possession of the properties to Branser; and as a consequence thereof, under date of November 3, 1933, Branser brought a suit for the purpose of ousting the mining company for the purpose of recovering damages for unlawful holding-over and for the purpose of obtaining an injunction restraining the mining company from further removing ores from the properties. As a consequence of this law suit, the settlement was agreed upon, the terms of which were evidenced by a stipulation filed in the action under date of January 3, 1934 (R. 67, Line 16 to R. 88, line 4). With respect to this stipulation the petitioner herein has specifically admitted that it was one executed on behalf of the mining company and with complete authority on its behalf (R. 68, Line 8 to R. 69, Line 5).

The effect of this stipulation was that for the consideration of $10,000 paid to Branser and 10,000 shares of the mining company stock delivered to him, Branser granted the mining company until July 1, 1934 (July 2d in legal contemplation since the first day of July was a Sunday), or a period of six months within which to buy the Branser property with a further cash consideration of $25,000 that an order theretofore issued restraining the mining company from mining operations be vacated, that the parties to the stipulation release claims one against the other, that time was of the essence of the stipulation and that if the mining company failed to make the specified payments on or before July 1, 1934, Branser would be entitled to a default judgment for the return or surrender of possession of the premises without further proceedings. The Record further uncontradictedly discloses that within the period of a week prior to July 1, 1934, the mining company was absolutely without funds to

make the required $25,000 payment, and under these circumstances the respondent, Trunz, paid the $25,000 to Branser; and except for the fact that respondent made the payment, the provisions of the stipulation would have become effective and all the rights of the mining company would have been lost (R. 59, Line 20 to R. 65, Line 2; R. 136, Line 10 to R. 139, Line 26; R. 157, Line 12 to R. 158, Line 26; R. 214-218). It is particularly to be noted that the stipulation in question (Plaintiff's Exhibit 3, R. 82-87) did not in terms permit of the assignment of the option, and at the time when respondent made the $25,000 payment, the representatives of Branser refused to deed directly to respondent and insisted that the deed would have to be delivered wherein the mining company was named as grantee (R. 82-87; R. 96-100). Except for this situation it is reasonably certain that there would never have been a semblance of title to the Branser property shown in the name of the mining company and thus it is clear that the execution of the deed (Plaintiff's Exhibit 7, R. 107-110) by the mining company was the only means by which the mining company could obtain for itself additional time for the purchase of the Branser property and the protection of the investments of the stockholders made in connection with the attempt to acquire and develop those properties. Thereafter respondent paid the taxes upon the Branser property (R. 152-153).

Under date of June 28, 1934, in connection with respondent's payment of the $25,000 required to release from escrow the deed from Branser and to pass title to the Branser property and by an agreement (Plaintiff's Exhibit 4, R. 89-92), Trunz agreed to give to the mining company an option to purchase the Branser property from him within a year's time upon condition that prior to October 1, 1934, the mining company should raise at least $25,000 of additional capital or such larger sum as might be needed for the erection of a mill and the pay-

ment of current debts. If the mining company exercised the option, respondent was to receive at his election either $30,000 cash or 100,000 shares of stock of the mining company (R. 91-92).

The Record contains much evidence showing the unsuccessful efforts made to raise the $25,000 needed to close the Branser option and that which was done in the way of raising money to fulfill the conditions precedent required by the option agreement (Plaintiff's Exhibit 4, R. 89-92), *i. e.*, the erection of a mill and the payment of current debts on or before October 1, 1934. A man named Crone loaned the money for the former and took a chattel mortgage as his security, later foreclosing the mortgage. Even the respondent in 1934 and subsequent to his payment of $25,000 to Branser loaned the mining company money, approximately $14,000, for which he took unsecured notes of the mining company which were never paid (R. 124-126; R. 157-158; R. 160-161; R. 173-179; R. 191-198).

Amplifying the provisions of the instrument (Plaintiff's Exhibit 4, R. 89-92) and by the instrument (Plaintiff's Exhibit 8, R. 113-116) under date of October 31, 1934, respondent gave to the mining company written permission to enter upon and mine the Branser properties until September 30, 1935.

For the very evident purpose, among other things, of ratifying the action of its officers in negotiating for and executing these various agreements (Plaintiff's Exhibits 4, 7 and 8, R. 89-92; R. 107-110; R. 113-116), a meeting of the stockholders of the mining company was held on December 3, 1935 (See Plaintiff's Exhibit 9, R. 118-136). From the minutes of this meeting specifically it appears that the mining company had been raising money for purposes contemplated by the agreement (Plaintiff's Exhibit 4), and particularly the stockholders adopted the following resolution:

> "RESOLVED, that the stockholders present at this meeting approve the action of the officers and directors of this corporation for the past year."

(R. 130, Lines 27-30.)

The mining company never exercised the Trunz option. Neither did it or anyone claiming to act on its behalf ever offer at any time to exercise the option or repay to respondent any part of the $25,000 he paid Branser (R. 152; R. 191-194). For just how long a time the mining company remained in possession of the Branser property is not disclosed by the Record, but respondent did not commence this present action until the month of October, 1938 (R. 3-5).

The petitioner here has asserted no rights either as a stockholder of the mining company or on behalf of other stockholders of the mining company. While petitioner's counsel have made the assertion that it is admitted that the Branser property was sold at a Sheriff's execution sale consequent upon a judgment against the mining company (Petition, p. 3) and that the predecessor in interest of said petitioner redeemed such properties from such sale and as a stockholder of the mining company, this assertion is not literally nor is it technically correct. That which respondent admitted was exposed for sale and sold by the Sheriff of Park County was the interest, *if any*, of the mining company in the Branser property (R. 37-41). The execution because of which the sale was made was issued July 28, 1936, clearly at a time when the mining company had no legal rights of any kind with respect to the Branser property.

As a result of this redemption petitioner claimed that as of November 10, 1937, redemptioner Birkel "became and was the owner of said real property described in said complaint and the holder thereof in fee simple absolute" (R. 30, Lines 4-7). Petitioner predicates its claim of

ownership upon a deed from Birkel to it dated March 31, 1934 (R. 30, paragraph 5, of Answer).

The foregoing recital of facts has the support of the District Court's specific Findings of Fact 1 to 21, both inclusive, and 24 to 39, both inclusive (R. 287-331), and the implied support of the District Court's general finding in respondent's favor (Finding of Fact 40, R. 330-331).

The mining company never appeared in this action and its default was duly entered (see Judgment and Decree, R. 334-337).

That which the officers of the mining company did, within the year prior to December 3, 1934, and that which was on December 3, 1934, ratified by the vote of at least two-thirds of all the stockholders at a meeting of the stockholders of the mining company legally noticed and held (Plaintiff's Exhibit 9, R. 118-136), was not really the sale of all or any part of the assets of the mining company, but it was a business transaction calculated to preserve the assets of the mining company as such assets were represented by investments made under the Branser option and under the Trunz option. The action was entirely without the purview of Section 6004, Revised Codes Montana, 1935.

ARGUMENT.

POINT I.

Section 6004, Revised Codes, Montana, 1921 and 1935, relates only to steps to be taken by the stockholders of a corporation to effectuate a sale of its assets outside the ordinary course of business.

The evidence in this case fails to disclose whether or not this statutory procedure was followed. It has been determined by the Montana Supreme Court that this Section became a part of the Laws of the State of Montana as the means of permitting a two-thirds majority of the stockholders of a corporation to sell the assets of a solvent corporation in transactions out of the ordinary course of business and thus prevent minorities from blocking such sales. It has likewise been determined that this Section was not intended as a restriction upon the powers of the officers and directors of a corporation with respect to transactions incident to the ordinary activities of the corporation and calculated to further its continuance in business.

> *Wortman* v. *Luna Park Amusement Co.*, 61 Mont. 89, at page 96, *et seq.*, 201 Pac. 570, at page 571, *et seq.*

in comparison with

> *Forrester* v. *B. & M. Mining Co.*, 21 Mont. 544, at page 552, *et seq.*, 55 Pac. 229, at page 232, *et seq.*

Section 6004, Revised Codes Montana, 1921 and 1935, was formerly Section 3897 of the Revised Codes of Montana, 1907.

The petitioner relies almost entirely upon the case of

Hanrahan v. *Anderson,* 108 Mont. 218, 90 Pac. (2d) 494.

The decision in this case is not contrary to respondent's contention, but on the other hand the court in that case in its decision supports respondent's contention and the findings of the District Court to the effect that petitioner's transactions with the mining company relate to ordinary business transactions which its officers had authority to handle.

In the *Hanrahan-Anderson* case the action was commenced by a stockholder for the benefit of the corporation and its other stockholders. A certain John Wight, who owned or controlled about 70% of the stock of the corporation in question and who admitted that he had consistently handled the affairs of the corporation without giving consideration to the views of the other directors or stockholders, had in this fashion brought about a purported transfer of the assets of the corporation to another corporation in exchange for shares of the stock of such other corporation. Under these circumstances and upon the stockholders' attack, the court quite properly determined that the pretended transfer was ineffective. There is no similarity at all between it and the case at bar. Not only did the officers of the mining company transact business which was calculated to further the business activities of the mining company, but in furtherance and to render effective the stipulation in the case of Branser against the mining company (Plaintiff's Exhibit 3, R. 82-87), which was conceded by the petitioner

to have been made between competent parties and with due authority (R. 67-69).

The court in *Hanrahan* v. *Anderson, supra,* at pages 231-232 of 108 Montana and pages 499-500 of 90 Pacific (2d) said:

> "It has been held that the directors, unless specially empowered, could not sell any portion of the estate of the corporation essentially necessary for the transaction of its customary business (2 Thompson on Corporations, Secs. 1289, 1290; *Rollins* v. *Clay,* 33 Me. 132). The reason for the rule is that the purpose of a solvent corporation and of its stockholders is not to be defeated in whole or in part by the directors, nor even by the stockholders without unanimous consent, unless expressly provided by law (*Forrester* v. *Boston & Mont. Con. C. & S. Min. Co.,* 21 Mont. 544, 55 Pac. 229, 353). It was to relax the rule in the latter respect so as to prevent a small minority from thwarting the will of the overwhelming majority that the statute now appearing as Section 6004, *supra,* was enacted; and to make the relaxation of the law effective, its requirements must be essentially complied with (*Wortman* v. *Luna Park Amusement Co.,* 61 Mont. 89, 201 Pac. 570)."

It will appear therefore from these three cases, which are the only decisions of the Montana Supreme Court wherein Section 6004, Revised Codes Montana, 1921 and 1935, have been considered, that the purpose of this Statute was to liberalize the existing law and not to further restrict the business affairs of the corporations. Moreover, it is provided in Section 6004 of the Revised Codes of Montana, 1921 and 1935, that:

> "Nothing contained in this act shall be deemed to limit or restrict the powers of the board of directors or trustees of such corporation in relation to the disposition of property or the conduct of business."

The business of the mining company was to acquire and operate mining claims, and the documents which petitioner asserts in his Specification of Errors to be invalid were executed in the ordinary course of business and by the officers of the corporation and in furtherance of a contract which the petitioner concedes to have been duly authorized. Under these circumstances this petitioner, who has no privity with the mining company or with the respondent, should not be heard to complain.

POINT II.

In executing the instruments enumerated in petitioner's specification of errors, the officers of the mining company were dealing with the ordinary business affairs of the company, and the said agreement and deed were such as were usual, proper and necessary in the ordinary prosecution of its business, and for this reason these transactions do not come within the purview of Section 6004, Revised Codes, Montana, 1921 and 1935.

It is conceded by the petitioner (R. 67-69) that the stipulation (Plaintiff's Exhibit 3, R. 82-87) was entered into by competent parties and that such action was duly authorized. In the face of the facts, respondent was entitled to assume that the President and Treasurer, with respect to the instrument of June 28, 1934 (Plaintiff's Exhibit 4, R. 89-92), and that the President and Assistant

Secretary, with respect to the instrument of July 2, 1934 (Plaintiff's Exhibit 7, R. 107-109), were acting and they were in fact acting within the scope of their authority and with respect to the ordinary prosecution of the mining company's business. No claim has been made and no evidence offered to show that the Branser property was the sole asset of the mining company. The respondent, Trunz, was dealing with the responsible officers of the company, and he had a right to assume that they had the power and authority which they purported to have and which their positions would seem to indicate.

> *Alley* v. *Butte & Western Mining Co.*, 77 Mont. 477, at page 492, 251 Pac. 517, 522;
> *Trent* v. *Sherlock*, 24 Mont. 255, 61 Pac. 650, 652;
> *Mayger* v. *St. Louis Mining & Milling Co. of Mont.* 68 Mont. 492, 219 Pac. 1102.

The petitioner in his brief says on page 11:

> "It is apparent from the record that this so-called agreement was *never authorized by the stockholders or the directors of the corporation*, but was the plan and device of the president, also a director, and Keck, a director."

It is significant that this statement is not supported by any reference to the Record by page. The fact of the matter is that the Record is silent in this respect, and there is nothing to show whether or not the agreement of June 28, 1934, was authorized by the directors or by the stockholders. It is, however, significant that the petitioner conceded at pages 67-69 of the Record that the stipulation (Plaintiff's Exhibit 3, R. 82-89) was entered into with full authority, and the agreement of June 28, 1934, was entered into in furtherance of this stipulation.

With respect to the powers of the President of a corporation and the reliance which those dealing with the corporation may place thereon, in *Alley* v. *Butte & Western Mining Co., supra*, at page 492, Montana, and at page 522, Pacific, the court says:

> "With the growth of business transacted through the instrumentality of corporations, the rule has been adopted that: 'Where the president of a corporation makes a contract within the ordinary scope of the business of the corporation, unless notice to the contrary is given, a person dealing with the president may proceed upon the assumption that the president has authority as agent to bind it.' (*Mathias* v. *White Sul. Springs Assn.*, 19 Mont. 359, 48 Pac. 624.)
>
> In *Mayger* v. *St. Louis Min. Co.*, 68 Mont. 492, 219 Pac. 1102, this court, speaking through Mr. Chief Justice Callaway, said: 'This court never followed the ancient rule that the president of a corporation has no greater power than any other director. On the contrary, long ago, it adopted the more modern, and what Mr. Fletcher (3 Fletcher's Cyc. Private Corporations, Sec. 2011), calls "the sensible rule, in accordance with the well-recognized ideas of the people at large, that a president of a corporation is the head of the corporation subject to the control of the board of directors as to matters out of the ordinary, but with power to bind the corporation in regard to contracts involved in the everyday business of the corporation." In *Trent* v. *Sherlock*, 24 Mont. 255, 61 Pac. 650, Mr. Chief Justice Brantly, said, "No principle of law is more clearly settled than that an agent to whom is intrusted by a corporation the management of its local affairs, whether such agent be designated as president,

general manager, or superintendent, may bind his principal by contracts which are necessary, proper, or usual to be made in the ordinary prosecution of its business. (Citing cases.) The fact that he occupies, by the consent of the board of directors, the position of such an agent, implies, without further proof, the authority to do anything which the corporation itself may do, so long as the act done pertains to the ordinary business of the company''.'

Again we have held that, when a contract is properly signed by the president and secretary of a corporation, as this note was, and the seal of the corporation is affixed thereto, such execution is *prima facie* evidence that the officers signing were duly authorized to execute the instrument and that its execution was the act of the corporation. (*Gensberger* v. *Adams,* 62 Mont. 430, 205 Pac. 658.)''

It is true that the corporate seal was not affixed to the agreement of June 28, 1934, and it is also true that the corporate seal was affixed to the instrument of July 2, 1934, and both were signed by the President.

The principles of law laid down in the above quotation have been cited with approval in the following cases:

Wells-Dickey Co. v. *Embody,* 82 Mont. 150, 266 Pac. 869;

Oscarson v. *Grain Growers Assn.,* 84 Mont. 521, 277 Pac. 14;

Bingham v. *National Bank,* 105 Mont. 159, 72 Pac. (2d) 90.

POINT III.

It is the law, both in the Montana courts and in the federal courts, that findings of fact made by the trial court must be sustained if there is any evidence at all to support the same.

Rule 52A of Rules of Civil Procedure;
Cherry-Burrell Co. v. *Thatcher,* 107 Fed. (2d) 65;
Clack v. *Clack,* 98 Mont. 552, at 570, 41 Pac. (2d) 32, at page 38;
Welsh v. *Thomas,* 102 Mont. 591, at 602, 61 Pac. (2d) 404, at page 407.

The trial court found (Finding of Fact 11, R. 295-298) that on June 28, 1934, the petitioner, Max Trunz, and the mining company entered into the agreement challenged by the first specifications of error (Petitioner's Brief, page 9) and by Finding of Fact 15 (R. 302-304) that the mining company subscribed, acknowledged and delivered to the petitioner, Max Trunz, its deed dated July 2, 1934, being the deed mentioned in the second specification of error (Petitioner's Brief, page 8), and by Finding of Fact 20 (R. 308) the court found:

> "In doing all of the things he is hereinbefore stated and shown to have done Martin R. Guenzel was acting in the course of his employment as the President of the defendant Glengarry Mining Company, a corporation, and for and on its behalf, in connection with obligations and contracts essential to its ordinary affairs and for the purposes of the corporation."

If there is any evidence in the Record to show that Martin R. Guenzel, the President, was acting in the

course of his employment as the President of the defendant mining company and for and on its behalf in connection with obligations and contracts essential to its ordinary affairs and for the purposes of the corporation in executing the agreement of June 28, 1934, and the conveyance of July 2, 1934, then the court's findings in this respect should not be disturbed. It is respectfully submitted that there is ample evidence to support these findings.

POINT IV.

Respondent, by paying the $25,000 to Branser on July 2, 1934, acquired equitable title to the Branser property.

Section 6785, Revised Codes of Montana, 1921 and 1935, provides:

> "When a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

Humbird, et al. v. *Arnet, et al.*, 99 Mont. 499, at page 510, 44 Pac. (2d) 756.

Moreover, this Statute is merely declaratory of the common law in this respect.

Lynch v. *Herrig*, 32 Mont. 267, at page 274, 80 Pac. 240.

Although respondent alleged in the complaint that he was the owner in fee simple and if in fact he was only the owner of an equitable title, then he was entitled to

prove his equitable ownership in this action and to have title quieted in him.

Van Vranken v. *Granite County,* 35 Mont. 427 at page 430, *et seq.,* 90 Pac. 164;
Le Vasseur v. *Roullman,* 93 Mont. 552, at page 556, 20 Pac. (2d) 250.

Accordingly, even if the petitioner should be wholly right in his contention that the instrument dated June 28, 1934 (Respondent's Exhibit 4, R. 89-92) and the instrument dated July 2, 1934 (Respondent's Exhibit 7, R. 107-110) were each invalid, nevertheless on the undisputed facts and under the law of Montana, the respondent, Trunz, when he paid $25,000 to Branser for the deed (Respondent's Exhibit 6, R. 103-105), received an equitable title to the Branser property and was entitled to maintain this action and was entitled to have title quieted in him; and the petitioner and its assignor, Birkel, and Crone, from whom he redeemed, each and all took whatever interest they acquired subject and subordinate to the equitable title of the respondent, Trunz.

The petitioner in its answer (R. 27-28) alleges that on or about June 23, 1936, Seth A. Crone obtained a judgment in the District Court of the Sixth Judicial District of the State of Montana against the mining company, and this is admitted in respondent's reply (R. 37). It further appears that an execution was issued on this judgment on July 28, 1936 (R. 37), and it is upon this judgment that petitioner predicates its title. This judgment and the execution issued thereon were subject to respondent's interest, whether legal or equitable, in the Branser property.

POINT V.

When Crone bought at the execution sale and Birkel redeemed and thereafter conveyed to petitioner, each and all of them took such title as they acquired subject to the equities of the situation.

MacGinniss Realty Co. v. *Hinderager,* 63 Mont. 172, at page 183, 206 Pac. 436, at page 439.

"This alone, however, is not conclusive, for the purchaser at an execution sale takes his title subject to certain limitations which are indicated in the rule laid down by this court in the case of *Story* v. *Black,* 5 Mont. 26, 52, 51 Am. Rep. 37, 1 Pac. 1, 10, as follows: 'The purchaser at a sale of real property on execution acquires all the right, title, interest and claim of the judgment-debtor therein; * * * but he acquires only such right and interest, and he takes the property subject to all the rights and equities of third parties which are capable of being enforced against the judgment-debtor. "The rule of *caveat emptor* applies to execution sales."' "

Sherlock v. *Vinson,* 90 Mont. 235, at page 240, 1 Pac. (2d) 71, at page 72.

"The rule of *caveat emptor* applies to execution sales. The purchaser at a sale of real property on execution acquires all of the right, title, interest and claim of the judgment-debtor therein and no more. (*Story* v. *Black* 5 Mont. 26, 51 Am. Rep. 37, 1 Pac. 1, followed in *MacGinniss Realty Co.* v. *Hinderager,* 63 Mont. 172, 206 Pac. 436.)

'The sale by sheriff excludes all warranty. The purchaser takes all risk. He buys on his own knowledge and judgment. *Caveat emptor* applies in all its force to him. If this were not the law, an execution, which is the end of the law, would only be the commencement of a new controversy; the creditor kept at bay during a series of suits, before he could reap the fruits of his judgment and execution.' (*Smith* v. *Painter*, 5 Serg. & R. [Pa.] 223, 9 Am. Dec. 344, and see *Meherin* v. *Saunders*, 131 Cal. 681, 54 L. R. A. 272, 63 Pac. 1084.)"

POINT VI.

The Circuit Court of Appeals has disposed of the questions of law in this case in accordance with the laws of the State of Montana, and it is respectfully submitted that the petition should be denied.

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